

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF MISSISSIPPI

CASE NO. 2008-CA-00690

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JOHN CLAYTON KABBES

APPELLANT

VERSUS

JOHN BAXTER BURNS

APPELLEE

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Appeal From the Chancery Court of  
the First Judicial District of Hinds County, Mississippi

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**APPELLANT'S REPLY BRIEF**

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ORAL ARGUMENT NOT REQUESTED

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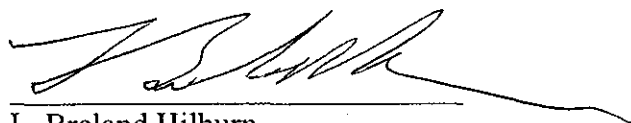
APPELLEE

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the Justices for the Supreme Court of Mississippi may evaluate possible disqualification or recusal.

1. Appellant John Clayton Kabbes;
2. L. Breland Hilburn, attorney at law and C. Louis Clifford IV, of Ware Clifford PLLC;
3. Appellee John Baxter Burns;
4. J. Kevin Watson of Watson and Jones, attorneys for appellee John Baxter Burns;
5. Lynn Macon, Executrix of the Estate of Martha Thomas Kabbes Burns;
6. A.M. Edwards III of Wells, Moore, Simmons and Hubbard, PLLC, attorney for Lynn Macon;
7. James H. Herring of Herring, Long & Crews, PC, attorney for the Estate of Martha Thomas Kabbes Burns.
8. Honorable Denise Owens, Hinds County Chancery Court Judge.
9. Honorable Stuart Robinson Sr. retired Hinds County Chancery Court Judge.

Respectfully submitted, this the 8th day of December, 2008.

A handwritten signature in black ink, appearing to read 'L. Breland Hilburn', written over a horizontal line.

L. Breland Hilburn  
Attorney for the Appellant

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## ARGUMENT

**I. WITHOUT A FINDING BY THE LOWER COURT THAT A “WRONG” OCCURRED OR A STIPULATION BY THE PARTIES THE PROCEEDS OF THE SETTLEMENT WERE FOR A WRONGFUL DEATH THE LOWER COURT WAS LACKED AUTHORITY TO DECLARE THE PROCEEDS WRONGFUL DEATH PROCEEDS**

The case and statutory law in Mississippi is well established that the distribution found in the wrongful death statute conflicts with both the laws surrounding intestacy as well as the ability for a decedent to provide for the distribution of his or her estate through a will. Furthermore, the wrongful death statute, being in derogation of the common law, must be strictly construed on appeal. *Smith v. Garrett*, 287 So.2d 258, 260 (Miss. 1973). As such it is clear that in order for proceeds for a settlement to be distributed according to the wrongful death statute all of the elements of the claim for wrongful death must be satisfied. However, in the present case there has never been a stipulation amongst the heirs that the settlement was for wrongful death, nor was there a judicial finding that the settlement was for a wrongful death. In fact not only did the parties refrain from stipulating that the settlement was for a wrongful death, but John Burns, who was represented by counsel, filed a joinder in John Kabbes petition that the settlement was for a “doubtful claim.” [R. 52].

John Burns would have this Court refrain from reviewing the merits of John Kabbes argument on the grounds that his argument was never raised before the chancellor. (Appellee’s Brief at 7). Such a claim could not be further from the truth. In John Kabbes’ Reply to the Response of John Baxter Burns to Petitioner’s Motion for Reconsideration and for Sanctions, John Kabbes raised this precise argument and stated that in order for John Burns to preserve his wrongful death claim he had to either obtain an “adjudication of wrong on the part of the Defendant Michelin North American, Inc. or to obtain waivers from each of the statutory heirs.” [R. 87]. Accordingly, since John Kabbes raised this issue before the chancellor the issue is ripe for appellate review and John Burns’ contentions otherwise should be disregarded.

After disingenuously arguing that the claims of John Kabbes were not raised in the lower court, John Burns proceeds to state the John Kabbes' argument should be disregarded because following the logic of John Kabbes argument would discourage settlement. Once again nothing could be further from the truth. John Kabbes has at no time disputed the validity of the settlement; rather, the only issue in dispute in this appeal is the proper distribution of the proceeds of a settlement for a doubtful claim. Since the wrongful death statute is strictly construed upon appeal the only way for proceeds of a settlement to be distributed according to the wrongful death statute is if the court adjudicates a "wrong" or the wrongful death beneficiaries and heirs at law stipulate that the settlement is for a wrongful death. John Burns in his brief responds to only the first prong of the argument. In his brief Burns argues that requiring wrongful death beneficiaries to litigate that a wrong occurred would discourage settlement, and in that point he may be correct. However, John Burns wholly fails to address John Kabbes' contention that proceeds from a settlement may be distributed according to the wrongful death statute if all the wrongful death beneficiaries and heirs at law stipulate the settlement is for a wrongful death. The simple fact is John Burns freely chose to join in a petition to settle a doubtful claim knowing at the time John Kabbes disputed Burns' right to recover any of the proceeds of the settlement.

Furthermore, John Burns mistakenly argues in his brief that the "proceeds from this settlement cannot pass through the estate of Marth Kabbes Burns, as any claim against Michelin is necessarily a wrongful death claim and not one held by the estate of Martha Kabbes Burns." (Appelle's Brief at 10). The Mississippi Supreme Court has recently spoken on this very issue and stated, "the Mississippi wrongful-death statute, despite the Legislature's assigned nomenclature, encompasses all claims-including survival claims which could have been brought by the decedent, wrongful-death claims, estate claims, and other claims-resulting from a tort

which proximately caused a death.” *Caves v. Yarbrough, M.D.*, 991So.2d 142, 149-50 (Miss. 2008). Moreover, contrary to the argument of John Burns a survival claim and any claim(s) of the estate would necessarily pass under the Estate of Martha Kabbes Burns. In fact, the only claim that would pass outside the Estate of Martha Kabbes Burns is an award of damages for beneficiaries’ personal losses due to wrongful death. The Mississippi Supreme Court in a recent opinion advised that even when damages are awarded under the wrongful death statute damages which are intended to compensate the decedent for her individual loss such as lost wages, and the pain and suffering experienced between the time of injury and subsequent demise would be recovered through the estate. *River Region Med. Corp. v. Patterson*, 975 So.2d 205, 208 (Miss. 2007).

There is simply no finding in the record that the proceeds of the settlement were for wrongful death. Absent such a finding the only way for the proceeds to be distributed according to the wrongful death statute would be if all of the wrongful death beneficiaries and heirs-at-law stipulated the proceeds were for wrongful death. In the present case there was never a stipulation by the parties in fact the opposite is true; John Kabbes has at all times disputed the right of John Burns to recover anything. In addition, John Burns never petitioned the lower court to make a finding as to whether the proceeds were for wrongful death; rather, John Burns voluntarily filed a joinder to settle a doubtful claim. Without a finding of a wrong or a stipulation that the proceeds were for wrongful death the lower court was without authority to declare the proceeds wrongful death proceeds and doing so was error.

**II. THE CHANCELLOR ERRED IN HER DETERMINATION THAT THE ANTENUPTIAL AGREEMENT HAD NO BEARING ON THE DISTRIBUTION OF THE DISPUTED FUNDS**

The chancellor further abused her discretion and was manifestly wrong when she stated in her decree that the Antenuptial Agreement had “no bearing on the settlement of the wrongful death claim.” (R. at 62). Should this Court determine that John Burns is entitled to share in some



of the proceeds of the settlement this Court should remand the case for a hearing to determine what portion, if any of the disputed \$ 47,858.74 John Burns is entitled.<sup>1</sup>

John Burns relies solely upon *Pannell v. Guess*, 671 So.2d 1310 (Miss. 1996), for his contention that the chancellor does not have authority to hold an evidentiary hearing to determine how the proceeds of a settlement should be distributed. However, in relying on *Pannell*, Burns fails to acknowledge a subsequent change in the law which John Kabbes brought to this Court's attention in *River Ridge Med Corp. v. Patterson*, 95 So.2d 205 (Miss. 2007). The Court in *River Ridge* stated that while it is true under the wrongful death statute:

[C]ertain damages would have to be shared equally between them. However, here the jury awarded damages solely for loss of society and companionship. These damages are separate from and possibly in addition to any damages they would share equally – i.e., the damages of the estate and those suffered by Ms. Nettles.

*Id.* at 208. Furthermore, and contrary to the *Pannell* case relied upon by John Burns, in this case John Burns, by virtue of the Antenuptial Agreement, is not entitled to share in any recovery which is owed either to the estate for expenses, other than as a creditor, or for any monies which are meant to compensate Martha Kabbes Burns for her pain and suffering and/or lost wages as a result of the accident. The simple fact is should this Court determine John Burns is entitled to recover some of the disputed funds, the chancellor's finding that the Antenuptial Agreement had no bearing on the settlement of the wrongful death was in error. John Burns is not entitled to be compensated for any of Martha Kabbes Burns pain and suffering, loss earning capacity etc.; however, the chancellor's finding ignores the relevance of the Antenuptial Agreement John Burns freely and voluntarily entered into. Thus, at a minimum this Court should reverse the

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<sup>1</sup> This Court should also be aware that to date John Burns has received \$ 97,717.48 from Carmen Goforth and Lila Strode the daughters of Martha Kabbes Burns who have voluntarily paid John Burns a portion of their proceeds.

findings of the chancellor and order a hearing to determine what portion, if any, of the disputed \$47,858.74 is meant to compensate John Burns for his personal losses.

## CONCLUSION

The wrongful death statute must be strictly construed on appeal. Thus, in order for proceeds of a wrongful death settlement to flow through the wrongful death estate all of the elements found in the statute must either be found to exist by the lower court, or stipulated to by the beneficiaries. In the present case Chancellor Robinson, in his decree, found any claim to be doubtful; furthermore, no attempt was made by John Burns to petition the lower court to adjudicate a wrong. As such a vital element necessary for the creation of a wrongful death estate is missing, i.e. a wrong. John Burns had two options to protect his interest he could have asked the court to adjudicate a wrong, or he could have sought the beneficiaries to stipulate that the settlement was for wrongful death. However, instead of petitioning the court to adjudicate a wrong John Burns joined in a petition to settle a doubtful claim. As there was no finding by Chancellor Robinson that a wrong occurred, nor was there an agreement amongst the beneficiaries the settlement was for wrongful death, Chancellor Owens lacked authority to declare the disputed funds to be wrongful death proceeds and accordingly the determination by the lower court that the proceeds were for wrongful death should be reversed.

However, should this Court determine the disputed funds were for wrongful death the lower court further erred in its determination that the Antenuptial Agreement entered into between John Burns and Martha Kabbes Burns had no bearing on the distribution of the disputed funds. Contrary to the lower court's finding the Antenuptial Agreement precludes John Burns from receiving any monies which were meant to compensate Martha Kabbes Burns for her personal losses. By finding the Antenuptial Agreement to have no bearing on the distribution of the proceeds the lower court failed to acknowledge that fundamental distinction and was in error. Accordingly, should this Court determine the disputed proceeds were wrongful death proceeds this Court should remand the case to the Chancery Court of the First Judicial District of Hinds

County for a hearing to determine what portion of the disputed funds, if any, is meant to compensate John Burns for his personal loses and what portion of the disputed funds is meant to compensate the Estate of Martha Kabbes Burns which the Antenuptial Agreement precludes him from receiving funds from.

**Respectfully Submitted**, this the 8th day of December, 2008.

**JOHN CLAYTON KABBES**

BY: 

**L. BRELAND HILBURN  
ATTORNEY FOR APPELLANT**

## CERTIFICATE OF SERVICE

The undersigned counsel of record for, Appellant, hereby certifies that true and correct copies, electronic and paper, of the Appellant's Principal Brief were delivered via US Mail to the following addresses:

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